

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 497 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE R.BALIA.

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1. Whether Reporters of Local Papers may be allowed
to see the judgements? YES

2. To be referred to the Reporter or not? YES

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3. Whether Their Lordships wish to see the fair copy
of the judgement? NO

4. Whether this case involves a substantial question
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder? NO

5. Whether it is to be circulated to the Civil Judge?
NO

KUSUMBEN CHHOTUBHAI BHANDARI

Versus

GUJARAT HOUSING BOARD

Appearance:

MR UTPAL M PANCHAL for Petitioner

MRS KETTY A MEHTA for Respondent No. 1

MR DEVANG T SHAH for Respondent No. 3

CORAM : MR.JUSTICE R.BALIA.

Date of decision: 18/03/98

ORAL JUDGEMENT

1. Heard learned counsel for the parties. A preliminary objection has been raised on behalf of the respondents that, in view of section 8 read with section 26 of the Bombay Civil Courts Act, the appeal against the order under appeal lay to the District Court and not to the High Court directly, inasmuch as the valuation of the suit out of which this appeal has arisen is less than

Rs.50,000/- . Learned counsel for the appellant urged that right of an appeal is a vested right of the party to the suit. Such right comes into existence as on the date of filing of the suit. As on the date the suit was filed, any appeal arising out of a suit which was valued at Rs.20,000/- or more, lay directly to the High Court as the provision then stood. The subsequent amendment in the provision would not take away the parties' right to file an appeal directly to High Court under the said provision, as that right came to be vested in parties on the date of filing of the suit. For the said proposition, learned counsel relies on 1968 (9) GLR 24 and AIR 1969 Guj. 94.

2. Having carefully considered the rival contentions, in my opinion, the preliminary objection merits to be sustained.

3. Law is trite that right of appeal is a vested right and it vests in the litigant at the time when the action is brought. At the same time, it is equally true that such right is to void the order challenged in the superior Court only, but there is no such right as to the forum where the appeal can be filed. In this connection, reference may be made to the case of Maria Christine De Souza Soddar vs. Maria Zurna Pereira Pinto and others AIR 1979 SC 1352.

In the aforesaid case, the question directly arose as to the effect of change in law as to the forum of appeal during the pendency of the suit on deciding the question the Court to which appeal would lie from the decree or orders passed in such suit after the amendment had come into existence. In the aforesaid case, the suit had been instituted in the Court at Margao on 15/3/60 by the plaintiffs who were respondents before the Supreme Court. As on the date the suit was filed under the provisions of Portuguese Civil Procedure Code, the appeal was required to be filed in the Court which decided the suit. However, after filing of the suit, the territories of Goa, Daman and Diu were liberated and became a part of the Union of India with effect from December 20, 1961. The Parliament enacted Goa, Daman Diu (Extension of the Code of Civil Procedure 1908 and Arbitration Act 1940) Act, 1965 (Act XXX of 1965) with the corresponding provisions of the Portuguese Code being repealed. After the Code of Civil Procedure became applicable to the territories of Goa, Daman and Diu, the appeal against the order passed by the Court, at Margao was filed in the Court of Judicial Commissioner, Goa. The contention was raised that the appeal had not been filed in proper Court

on the identical grounds as has been raised by the respondent.

The contention that since the right of appeal had been conferred by Portuguese Court, the forum where it could be lodged was also governed by the Portuguese Code, was not accepted. The Court quoted with approval, the following passage from Salmond's Jurisprudence (12th Edition) pointing out that, two of the Courts the proceedings must be instituted is essentially of procedural law, which reads as under :

"Whether I have a right to recover certain property is a question of substantive law, for the determination and the protection of such rights are among the ends of the administration of justice, but in what courts and within what time I must institute proceedings are questions of procedural law, for they relate merely to the modes in which the courts fulfil their functions."

The Court further held that;

" It is no doubt well settled that the right of appeal is a substantive right and it gets vested in a litigant no sooner the lis is commenced in the Court of the first instance, and such right or any remedy in respect thereof will not be affected by any repeal of enactment conferring such right unless the repealing enactment either expressly or by necessary implication takes away such right or remedy in respect thereof. But the forum where such appeal can be lodged is indubitably a procedural matter and, therefore, the appeal, the right to which has arisen under a repealed Act, will have to be lodged in a forum provided for by the repealing Act. That the forum of appeal and also the limitation for it, are matters pertaining to procedural law."

Referring the provisions of the General Clauses Act providing the effect of repeal of remedies or legal proceedings, the Court said that;

" This provision merely saves the remedy or legal proceeding in respect of such vested right which it is open to the litigant to adopt

notwithstanding the repeal but this provision has nothing to do with the forum where the remedy or legal proceeding has to be pursued. If the repealing Act provides new forum where the remedy or the legal proceedings in respect of such vested right can be pursued after the repeal, the forum must be as provided in the repealing Act."

In coming to this conclusion, Their Lordships approved the decision of the Rajasthan High Court in *Purshottam Singh vs. Narain Singh* and another AIR 1955 Raj. 203.

4. The said principle was adhered to by the Court in *P. Mohammed Meera Lebbai vs. Thirumalaya Gounder Ramaswamy Goundar and others* AIR 1966 SC 430 in a slightly different situation. In case of Mohammed Meera (supra), the suit was instituted on February 10, 1950 in the District Court of Kottayam which was later transferred by it to the Court of the Subordinate Judge, Meenachil sometime in the year 1956 and was decreed in favour of the appellant before the Supreme court on July 13, 1958. At the time the suit was instituted, the Travancore Cochin High Court Act 5 of 1125 M.E. (Corresponding to 1949 A.D.) was in force. Under section 20 of that Act read with section 21 all appeals to the High Court valued at an amount in excess of Rs.1,000/had to be heard by a Division Bench consisting of two Judges of the High Court. The suit in question was valued at Rs.3,000/-. Thus, according to the law prevailing as on the date of institution of the suit, appeal arising out of that suit, was to be heard by a Bench of two or more Judges of the High Court. As noticed above, the decree was passed on July 30, 1958. Thereafter, Kerala High Court Act 1958 came into force w.e.f. March 3, 1959, which governed the procedure of the High Court. Under section 5 of the Kerala High Court Act, the jurisdiction of a single Judge of the High Court to hear and dispose of appeals from an original decree was extended to appeals in which the value of the subject matter did not exceed Rs.10,000/-. According to this provision which came into force during the pendency of appeal, the appeals were placed before the learned single Judge of the High Court and was so disposed of. In an appeal before the Supreme court, the question of law that was raised before it was whether in view of a vested right the appeal as on the date of institution of proceedings of appeals arising out of such proceedings could be heard by a single Judge of the High Court notwithstanding the fact that as on the date when appeals were actually heard, the single Judge only could exercise such

jurisdiction. Repelling the contention of the appellant on this aspect about the Forum of appeal, while the Court reaffirmed that "The right of appeal is a vested right and such a right to enter the superior court accrues to the litigant and exists as on and from the date the lis commences and although it may be actually exercised when the adverse judgement is pronounced such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal.

While deciding the question as to by whom the appeal is to be heard, the Court said that,

"That reason is that an appeal lay to a High Court and whether it is to be heard by one, two or a larger number of Judges, is merely a matter of procedure. No party has a vested right to have his appeal heard by a specified number of judges."

The question that it affected the rights of the parties to appeal before the Supreme Court inasmuch as no appeal lay to the Supreme Court as a matter of right against the judgement passed by the learned single Judge of the High Court under Article 133, the Court negated by saying that, "Once it is held that no party has a vested right to have his appeal heard by more than one judge of the High Court, no right to prefer an appeal under Art. 133 can be said to vest in him, the right under which being unavailable in case heard and disposed of by a single judge of the High Court."

In arriving to this conclusion, the Court followed the decision in case of *Ittavira Mathai vs. Varkey Varkey* AIR 1964 SC 907.

5. From the aforesaid decision, it is apparent that the Supreme Court has consistently held that while right to appeal is vested right, there is no such vested right in the forum namely to which superior Court the right of appeal shall be carried so long as right of appeal itself is not imperilled. It may be seen that the facts in the case of *Mohammed Meera* (supra), were very much similar to the facts of the case at hand. That was also a case where the face of forum changed on account of change in the law during the pendency of appeal as to the jurisdiction of different forums to hear the appeals according to the valuation of the suit had been amended. As on the date of filing of the suit, Division Bench of

the High Court was to entertain an appeal in case the valuation of the suit exceeding Rs.1,000/-. At the time when the appeal was heard, under the law then existing, a single Judge of the High Court was to hear all appeals from the Courts subordinate where the valuation of the suit did not exceed Rs.10,000/-. The contention was similar as has been raised before this Court viz. when the appeal as on the date of filing the suit which valued more than Rs.20,000/- but less than Rs.50,000/- lay to the High Court, but as on the date when occasion for exercise of such right has arisen due to the amendment in law, the appeal lay to the District Court only, if the valuation of the suit was less than Rs.50,000/-. In short, the appellant not only claimed a vested right to appeal to superior Court but also claimed a vested right to the forum of the superior Court, to which such appeal lay, which has not been sustained by the apex Court, as noticed above.

6. The decision relied on by the learned counsel for the appellant in the case of Garikapati Veeraya vs. N. Subbaih Choudhry and others (S) AIR 1957 SC 540, does not militate against the principles in this behalf. It was a case where the suit had been instituted on April 22, 1949 before the commencement of the Constitution when Federal Court of India was in existence and the Supreme Court has not been established. As on the date of filing of the suit, under section 110 of the Code of Civil Procedure, an appeal lay to the Federal Court against a decree passed in a suit valued at Rs.10,000/- or more. On commencement of Constitution under Article 395, the Government of India Act, 1935 was repealed, thereby abolishing the Federal Court. Under section 109 and 110 of the Code of Civil Procedure, the valuation for the purpose conferring right of appeal to the Supreme Court, which came to be established under the Constitution, was raised from Rs.10,000/- to Rs.20,000/-, under Adaptation of Law of 1950 under constitution.

7. The question had arisen on the other hand that the forum to which the appeal was provided under the law existing on the date of institution, had been abolished. The alternative forum created under the Constitution provided for higher valuation of the suit for opening its portals for an appeal under the relevant provisions of the Code of Civil Procedure. In the circumstances, the question had arisen whether a party to such suit had at all a right to file an appeal to the Supreme Court invoking the principle that right of appeal vested in as on the date of institution of the suit.

8. Obviously, it was a case distinct from the one which we have noticed above. It was a case where by repealing statute not only the forum has been altered but by amendment in the valuation clause, the right of appeal itself was affected inasmuch as while the suit was filed, a suit valued at Rs.10,000/- or more, gave litigant a right to appeal to the federal court directly which right came to be vacated by abolition of the federal court and substitution of the another forum. As the right of appeal itself had been affected, the court held that,

" Where the suit was instituted on April 22, 1949, the right of appeal vested in the parties thereto at that date and is to be governed by the law as it prevailed on that date, that is to say, on that date the parties acquired the right, if unsuccessful, to go up in appeal from the sub-court to the High Court and from High Court to the Federal Court under the Federal Court (Enlargement of jurisdiction) Act, 1947 read with cl. 39 of the Letters Patent (Mad) and Ss. 109 and 110 of the Code of Civil Procedure provided the conditions thereof were satisfied, unless that right had been taken away expressly or by necessary intendment by any subsequent enactment."

The Court further opined that,

"It is erroneous to say that the language of Art. 133 impliedly takes away the right of appeal."

The Court further opined that,

"In construing the articles of the Constitution Courts must bear in mind a cardinal rule of construction that statutes should be interpreted, if possible, so as to respect vested right. The golden rule of construction is that, in the absence of anything in the enactment to show that it is to have retrospective operation, it cannot be so construed as to have the effect of altering the law applicable to a claim in litigation at the time when the Act was passed."

On this principle, the Court concluded that, "Where the suit had been instituted before the date of the Constitution, the parties thereto has, from the date of the institution of the suit, a vested right of appeal upon terms and conditions then in force and where the judgement sought to be appealed from is a judgement of a

reversal and the value of the subject matter is above Rs.10,000/- the aggrieved party has a vested right of appeal to the Federal Court under the provisions of the old Civil Procedure Code read with the Government of India Act, 1935 and the Federal Act (Enlargement of Jurisdiction) Act, 1947. Such a vested right of appeal is a matter which does not fall within Art. 133 and jurisdiction and powers with respect to such right of appeal was exercisable by the Federal Court immediately before the commencement of the Constitution and consequently, the aggrieved party has a right of appeal under Art. 135. The aggrieved party is entitled under Art. 135 to come up on appeal to the Supreme court as of right and where such right has been wrongly denied to him, the Supreme Court would be prepared to grant him special leave to appeal under Art. 136 of the Constitution."

9. It would be seen that this was a case where the amendment or the change in law on commencement of Constitution, if liberally given effect to, would not only affect the forum to which appeal would lay, but result in imperilling the right of appeal to the Federal Court as a matter of right itself which was available to the litigant under the provisions of the Code of Civil Procedure. It was not a case of mere forum where the appeal would lay.

10. In that view of the matter, in my opinion, this decision does not assist the case of the appellant.

11. The decisions in the case of Pirdhandas Parsumal Vs. Harjibhai Mahommad and others, (9) GLR 24 and Vasava Narottam Unju vs. Shah Ambalal Maganlal AIR 1969 Gujarat 94 do not touch the controversy raised before me. The issue raised was whether the valuation of the suit for the purpose of conferring right of appeal is to be determined as per the law applicable on the date of filing of the suit or as per the law of valuation of the suit on the date of filing of the appeal. The valuation of the suit as on the date of institution being not in dispute in both the case, in both the cases, the Court has answered that the right of appeal will depend upon the valuation of the suit as on the date of filing of the suit and not on subsequent amendment in the suit valuation laws. This controversy in my opinion is besides the issue raised before me.

12. Section 8 of the Bombay Civil Courts Act, 1869 reads as under :

"8. Appellate Jurisdiction of District Court:-

Except as provided in sections 16, 17 and 26, the District Court shall be the Court of Appeal from all decrees and orders passed by the subordinate Courts from which an appeal lies under any law for the time being in force."

13. This provision clearly indicates that section 8 by itself does not confer any right of appeal, but merely provides the forum for appeal against an order passed by Court subordinate to District Court, in case any such appeal is provided under some other law for the time being in force governing the right of appeal. This is so because appeal is not inherent right but is creature of statute. Unless right of appeal is conferred by the Statute, no right independently is existing. This is clear indication of section 8 read with section 26 of the Bombay Civil Courts Act only governing the procedural part of exercise of right of appeal for the litigation as and when occasion for exercise of such rights arise during the course of proceedings. Right of appeal is governed by the other provisions of law. In the present case, as appeal is against the order, the right of appeal arises from the provisions of the Code of Civil Procedure u/s 105 read with order 43. Unlike the case before the Supreme Court in case of Garikapati Veeraya (supra), where right to appeal to federal court flew from the provisions of section 109, 110 of the Code of Civil Procedure. No such right of appeal to the High Court directly against an order appealable order flow from any provision of the Code which confers right of appeal. Once that right of appeal is conferred, the question then arises for consideration to which superior Court such an appeal is to be preferred which, as noticed above, is a part of procedural law and not of substantive law. Therefore, the subsequent amendment in Bombay Civil Courts Act after filing of the suit resulting in alteration in limit of valuation for the purpose of determining forum of appeal does not affect the vested right of appeal, but where such appeal would lay, will depend upon the existing forum as on the date when such right is to be exercised.

14. Before me, it is not in dispute that if the right is to be exercised in accordance with existing provisions, the appeal would lay against the impugned order before the District Court and not before the High Court.

15. In view of the aforesaid conclusion, the preliminary objection must be sustained by holding that appeal from order under appeal lay to the District Court and not to this Court.

16. In the circumstances, the appeal is returned to the appellant to be presented before the proper Court. The interim order passed by this Court shall continue until the appeal is presented before the appropriate Court and an order on Civil Application is made or for a period of one six weeks, whichever expires earlier.

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